

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1162

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit
UNITED STATES OF AMERICA,

vs.

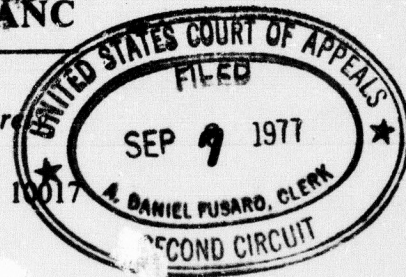
ALFRED CATINO,
Defendant-Appellant,

-and-

PUBLIC SERVICE MUTUAL INSURANCE CO.,
Respondent-Appellant.

**PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Docket No. 77-1162

-vs-

ALFRED CATINO,

Defendant-Appellant,

and

PUBLIC SERVICE MUTUAL INSURANCE CO.,

Respondent-Appellant.

PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING IN BANC

The Appellant, Public Service Mutual Insurance Company, petitions for rehearing either by the original panel, or by the Court in banc, pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure, from the Opinion and Judgment, dated August 22, 1977. Slip Op., p. 5437.

The panel of Judges Waterman, Smith and Oakes affirmed the judgment of forfeiture of the bail bond which had been posted in the District Court at the time of the arraignment and arrest of the defendant, and which bond had been declared forfeited by District Judge Milton Pollack after the defendant failed to surrender upon losing his appeal in this Court.

The Opinion of Judge Pollack granting forfeiture is reported at 427 F. Supp. 1009. The underlying case relates to the conviction of Alfred Catino, which was affirmed by this Court in United States vs. Mallah, 503 F. 2d 971.

The surety never did write a new bond for Catino on his appeal. Both this panel and the District Court held that the surety was responsible on the original trial bond which had been posted in the District Court at the time of the arraignment. In this regard, the panel of this Court wrote, in part, as follows (Slip. Op., page 5443):

"We therefore follow United States vs. Miller (539 Fed. 2nd 445, 448, 449) in holding that the relevant issue is whether appellants agreed to be liable during appeal 'by the language of their undertaking', 539 Fed. 2nd at 449. The bond here by its terms not only was a continuing bond, which continued in full force and effect until exoneration, but also contained a condition that Catino's surrender to serve any sentence imposed. Thus the bond as written, imposing as it did conditions more stringent than those in the standard form of appearance bond, was on its face both a trial and appeal bond."

In footnote 2, at Slip Op., p. 5444, the panel of this Court wrote:

"In view of the plain language of the bond, the District Court's refusal to accept the surety's offer of proof as to the practice in the District Court Clerk's office was proper, particularly since Appellants make no claim that the bond in issue was in the form customarily used by the District Court."

As a matter of fact, the bond at issue was in the form customarily used by the District Court. See attached affidavit of this author, as an appendix to this petition. All bonds utilized by the District Court either for trial purposes or for appeal are in the form mandated by the District Court. The Clerk's Office of the District Court actually prepares the bond on its own standard form. The bonding company merely supplies the power of attorney, which power of attorney is physically annexed to the bond prepared by the Clerk's Office. The Clerk's Office uses one standard form bond for the trial, and another standard form for the appeal. As such, footnote 2 of this Opinion contains a factual error.

Inasmuch as the Clerk's Office of the Southern District utilizes one standard form bond for trial purposes and another standard form for appellate purposes, it is difficult to agree, as this Court did write at page 5443, that the bond as written was on its face both a trial and an appeal bond.

It serves little purpose to affirm a legal issue when the predicate facts really are not clear. There still remains much confusion as to how bonds are actually written and posted in criminal matters, both at the trial level and at the appeal level. To hold that the bond in question was both a trial bond and an appeal bond flies in the face of the offer of proof that had been made by the surety who was willing to produce the Deputy Clerk of the District Court who would

testify as to the practices of the District Court, and the standard forms used by the District Court, both at the trial and at the appeal. I suggest that it is still very much in order that we hold an evidentiary hearing so that the Clerk of the Court can testify as to the procedures to be followed in posting a bond. I submit that the Clerk will testify that a trial court bond remains only a trial court bond, and that an appellate bond is required in order for a defendant to be admitted to bail pending appeal. Furthermore, the Deputy Clerk will testify that all bonds filed are on standard form used by the Clerk's Office, and that only one form can be used for the trial and only another form can be used for the appeal. As such, the Deputy Clerk is in a position to testify that one bond has never been used for both trial and appeal purposes.

I request that this Court vacate its judgment of affirmance, and temporarily hold in abeyance the opinion which it wrote. I request that the matter be remanded to Judge Pollack for a prompt evidentiary hearing, at which time the Deputy Clerk can testify as to the practices of the District Court with regard to the language and forms of bonds. I suggest further that either Counsel brief this matter in the Court of Appeals after the evidentiary hearing, or alternatively, Judge Pollack make necessary findings.

The effect of the opinion as it stands now upon both the bail bond industry and the Clerk's Office of the District Court may well be

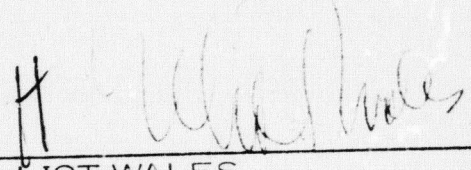
disastrous. The Clerk's Office has required bail bonds to be filed, any time the defendant has been admitted to bail pending appeal. Basically, the Clerk's Office carries out the functions and wishes of the District Judges themselves. The Opinion in this case can well throw into havoc the practices of the District Court Clerk's Office. Also, the Opinion in this case can well damage or destroy the bail bond industry itself. The surety companies have posted bonds on behalf of defendants in the District Court, knowing well that bonds would expire at the time of sentencing. Now the surety companies will have to reevaluate the risk to determine whether or not they wish to write a bond at the inception of the case, which bond may well last throughout the appellate procedure. In the event that the surety companies decline to write such bonds, because of the increased risks, and because of the loss of premiums involved, the inability of defendants in criminal cases to secure bonds may well pose a difficult problem for the District Court. If defendants cannot be admitted to bail, the pressure for immediate trials, let alone speedy trials, may prove extremely taxing to the resources and facilities of the District Court.

The impact of this opinion is grave indeed. The Opinion rests upon a misconception that the bonding company itself writes the language of the bond, whereas as a matter of fact it is the Clerk's Office of the District Court that writes the bond. As such we are dealing solely with

standard form bond, contrary to the statement contained in footnote 2 of the Opinion.

CERTIFICATE OF COUNSEL

I, H. Elliot Wales, member of the bar of this Court, do hereby certify that this application for rehearing is made in good faith, and not for the purpose of delay.


H. ELLIOT WALES
Counsel for Appellant, Public
Service Mutual Insurance Company
122 East 42nd Street
New York, New York 10017
Telephone: 212 682-6806

Dated: New York, New York
September 1, 1977

TO: Office of the Clerk
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Foley Square
New York, New York 10007

United States Attorney
United States Court House Annex
One St. Andrew's Plaza
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J. Jeffrey Weisenfeld, Esq.
401 Broadway
New York, New York 10013

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Docket No. 77-1162

-VS-

ALFRED CATINO,

Defendant-Appellant,

and

PUBLIC SERVICE MUTUAL INSURANCE CO.,

Respondent-Appellant.

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

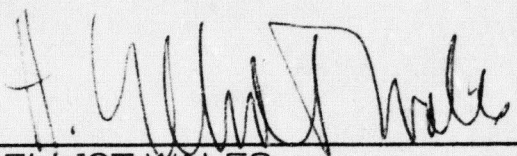
H. ELLIOT WALES, being duly sworn, deposes and says:

At all times both in the District Court and in this Court, I have been counsel for the respondent, Public Service Mutual Insurance Company.

On August 31, 1977, I did discuss the Opinion of this Court, and especially footnote 2 with Eddie Aponte, who is the Deputy Clerk of the District Court for the Southern District of New York, in charge of bail bonds in criminal cases. I advised Mr. Aponte of the substance of footnote 2, in which this Court wrote that the surety had not claimed that the bond at issue was in the form customarily used by the District Court. Eddie Aponte advised me that only standard form bonds are

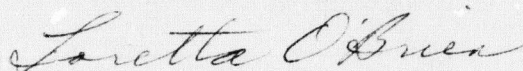
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HYPER-BRASE

used by his office - one form for the posting at the trial level and another form for the posting at the appellate level. Actually, Aponte's office prepares the bond on its own form, and attaches to it the power of attorney which was given to it by the surety company. Aponte advised me that a surety cannot use its own form, nor can it in any way add to or subtract from the standard form used by the District Court itself.


H. ELLIOT WALES

Sworn to before me this

1st day of September, 1977.



LORETTA O'BRIEN
Notary Public, State of New York
No. 41-8178958
Qualified in Queens County 28
Commission Expires March 31, 1978

CERTIFICATE OF SERVICE

77-1162

Re: U.S.A. v. Catino & Public Service
Mutual Insurance Co.

STATE OF NEW JERSEY :
: SS.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Appellant-Surety.

That on the 6th day of September, 1977, I served the within Petition for Rehearing and Suggestion for Rehearing in Banc

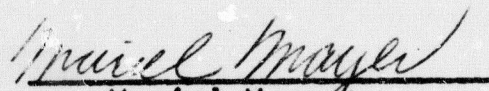
In the matter of United States of America v. Alfred Catino and Public Service Mutual Insurance Co.

upon

Robert Fiske, Esq.
U.S. Attorney for the
Southern District of New York
1 St. Andrews Plaza, New York, NY 10007

Jeffrey Weisenfeld, Esq.
401 Broadway
New York, N.Y. 10013

by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.


Muriel Mayer

Sworn to and subscribed
before me this 6th day
of September 1977.


A Notary Public of the
State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1982

9/7 by mail

